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In the Supreme Court of the United States

October Term, 1959

E. W. Rubenstein, petitioner,

v.

Federal Power Commission

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

J. Lee Rankin,
Solicitor General,
Stephen Christian Mott,
Assistant Attorney General,
Samuel D. Slade,
Attorney,
Department of Justice,
Washington 25, D. C.

William W. Gutherie,
General Counsel,
Howard E. Wahrenbrock,
Solicitor,
C. Louis Stuart,
Attorney,
Federal Power Commission,
Washington 25, D. C.

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S. W. RICHARDSON, PETITIONER

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FEDERAL POWER COMMISSION

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The letter order of the Federal Power Commission, dated October 3, 1957 (R. 123-125), is not reported. The Commission's order denying rehearing, issued November 27, 1957 (R. 137-140), is reported at 18 FPC 708. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 1a-2a) is reported at 266 F. 2d 233.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959 (Pet. App. 3a). The petition for a

writ of certiorari was filed on July 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19 (b) of the Natural Gas Act, 15 U.S.C. 717r (b).

QUESTIONS PRESENTED

A producer of natural gas was granted by the Federal Power Commission a certificate of public convenience and necessity to supply gas to an interstate pipeline, and to operate facilities for that sale, without any condition limiting the certificate to the term of his contract with the pipeline (10 years). The producer also filed the contract as his rate schedule pursuant to the Commission's rules. The questions presented are:

1. Does the expiration of the contract terminate the producer's certificate and obligation to supply gas to the pipeline?

2. Does the producer's subsequent execution of a new contract with the same pipeline for the same gas supply for a further period of years, but at a higher price, constitute a different "operation, sale, [or] service" for which a new certificate should be issued and an initial rate-filing made; or is the new higher rate a "change" in rate which is subject to a hearing under, and the procedures of, Section 4 of the Natural Gas Act?

3. In these circumstances, may the Commission without hearing reject the producer's application for a new certificate where it permits him to file his new contract as a "change" in rate for the sale covered by the previously issued certificate?

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the Natural Gas Act and the Federal Power Commission regulations are set forth in petitioner's Appendix at pp. 58a-69a.

STATEMENT

Petitioner, an independent producer of natural gas, sells gas at a separator located near the well-head of his gas well in the Gwinville Gas Field in Mississippi to an interstate pipeline. The sale was commenced under a contract (R. 12) entered into in August 1947, for a term of ten years from the date of first delivery (R. 35). Petitioner alleges that the ten-year term expired on September 9, 1957 (R. 128). The contract price was 7½¢ per Mcf for the first 5 years, and 8¢ for the next five (R. 32).

In November 1954, petitioner filed this contract with the Federal Power Commission as his FPC Gas Rate Schedule No. 1 (R. 12), pursuant to this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and the Commission's No. 174 series of orders (18 CFR (1958 Cum. Supp.) 154.91, *et seq.*), implementing that decision. On October 24, 1956, the Commission, upon petitioner's application (R. 49), issued a certificate of public convenience and necessity in Docket No. G-6252, "authorizing the sale by applicant of natural gas in interstate commerce for resale, together with the operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce * * *" (R. 75-76).

On September 16, 1957, petitioner entered into a new contract with the same pipeline (R. 90) "as of" September 16, 1957; applied to the Federal Power Commission for a certificate of public convenience and

necessity (R. 82); and tendered the new contract for filing as an "initial" rate schedule under Sections 154.92 (b) and 154.93 of the Commission's Rules (18 CFR 154.92 (b), 154.93) (R. 122). The new contract continued the identical delivery of gas from the same field and reservoir, but at the rate of 20¢ per Mcf (R. 111).

The new contract was to be in effect "* * * from and after the date of first delivery of gas hereunder" (R. 118). In his application for a new certificate, petitioner stated that all facilities for the delivery of gas were installed and that "* * * because of the imminent danger to life and property that would be occasioned by the shutting in of Applicant's wells or by the flaring of Applicant's gas from these Units in this highly developed area" (R. 86), he was selling gas from Gwinville Field to the pipeline on and *prior* to September 16, 1957 (R. 85-86), when the new contract was to become effective. Petitioner did not apply for approval of abandonment of the sale to the pipeline under Section 7 (b) of the Natural Gas Act, at any time.

The Commission, on October 3, 1957, rejected the application and the proffered filing because, as its letter (R. 123) explained, the certificate would have duplicated the previously issued certificates and the rate schedule would have increased petitioner's existing rate, and should have been filed as a rate-change under Section 4 (d) of the Natural Gas Act and in compliance with Section 154.94 of the Commission's Rules (Pet. App. 66a, *et seq.*). Petitioner applied for rehearing (R. 127) and the Commission denied reconsideration (R. 138), reiterating its previous explanation.

The court below, with Judge Brown dissenting, held that the same principles were applicable to this case

as those upon which its decision was based in *Sun Oil Company* v. *F.P.C.*, 266 F. 2d 222, pending on petition for certiorari, No. 321, this Term (Pet. App. 4a), a companion case decided the same day (Pet. App. 1a). It affirmed the Commission's order for the reasons set forth in the *Sun* case (Pet. App. 2a, 6a-11a).

ARGUMENT

Petitioner seeks to continue selling gas as he has heretofore, but at an increased price, without subjecting the increase to the Natural Gas Act's Section 4 procedures for suspension, hearing, and obligation to refund any part which the seller does not succeed in justifying. To this end he has entered into a new contract with the same pipeline-purchaser, and seeks to file the new agreement as an initial rate schedule (not subject to Section 4); he has also applied for a new certificate, although he has not sought or obtained permission to abandon his sale of gas under his first certificate. The Commission's rejection of this attempt, and its insistence that the new rate be filed as a change subject to Section 4, was clearly correct. No question of general importance requiring clarification by this Court, and no conflict of decisions, is presented.

1. Petitioner's basic argument (Pet. 13) is that "the provisions of the Act (Section 7) limit the certificating powers of the Commission to a sale (or service) 'proposed.' Here, the sale (or service) proposed was the [10 year] Contract, and no more." To certificate for a longer term, he contends (Pet. 12-13), "disregards the rule of *Mobile*,[1] which recognized the integrity of private contracts and their stature under the Act."

[1] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

But the Natural Gas Act is concerned with the sale or service and its continuity, and with the rate and its reasonableness, and not primarily with any private contract pertaining to these elements. This is the principle laid down by this Court under the cognate Federal Power Act in *Pennsylvania Water & Power Co. v. F.P.C.*, 343 U.S. 414, 421-424. In the *Penn Water* case, the producer-seller sought to avoid a Commission order fixing its rates for service from a pooling of electric generating facilities rendered under a contract which was held illegal under the antitrust laws in a private suit decided just after the rate order was first issued. Upon reconsideration in the light of that decision, the Commission reaffirmed its order as not dependent on the contract. This Court upheld the Commission's requirement that the service continue under the reduced rates, notwithstanding the disappearance of the contract. The opinion explained that (*id.* at 422):

> The duty of Penn Water to continue its coordinated operations with Consolidated springs from the Commission's authority, not from the law of private contracts.

The Court pointed out that discontinuance of the service could be accomplished, "provided Penn Water can prove that its wishes are consistent with the public interest", only by complying with the filing provisions of the Power Act[2] which correspond to those of Section 4 of the Natural Gas Act (343 U.S. at pp. 423-424).

There are several courts of appeals decisions in accord with this basic principle. *Bel Oil Corp. v. F.P.C.*,

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[2] Section 205 (d) of the Act of August 26, 1935, c. 687, 49 Stat. 851, 16 U.S.C. 824d (d).

255 F. 2d 548 (C.A.5), certiorari denied, 358 U.S. 804;[3] *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (C.A.5), certiorari denied, 332 U.S. 770; *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 239 F. 2d 97, 100-101 (C.A.10), reversed on other grounds, 353 U.S. 944; *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 267 F. 2d 471, pending on petition for certiorari, No. 335, this Term; *J. M. Huber Corp.* v. *F.P.C.*, 236 F. 2d 550, 558 (C.A.3), certiorari denied, 352 U.S 971; *Cities Service Gas Producing Co.* v. *F.P.C.*, 233 F. 2d 726, 730-731 (C.A. 10), certiorari denied, 352 U.S. 911.

In the first *Sunray* case, an independent producer applying for a certificate asserted, as petitioner does here, that the Commission must limit a certificate issued under Section 7 (c) of the Gas Act to the life of the producer's existing contract. Holding that the Commission could, under its Section 7 (e) power to impose certificate conditions, limit the term of a certificate if it finds such limitation required by the public convenience and necessity, the Tenth Circuit nevertheless stressed that, absent such a condition, the certificate must be for unlimited duration and (239 F. 2d at 100-101) that a contrary result would permit an independent producer to "dictate the terms and conditions of each certificate issued by the Commission. Applicants have no such rights." The court pointed out that protection of the public against exploitation depends on Commission control not only of initiation but cessation of service; the specific powers given the Commission to provide the public with adequate, reasonable, and continuous service would be useless if the natural gas

[3] Similar results were reached on the same ground in *Gulf Oil Corp.* v. *F.P.C.*, 255 F. 2d 556 (C.A. 5); *Sun Oil Co.* v. *F.P.C.*, 255 F. 2d 557, 559 (C.A. 5), certiorari denied, 358 U.S. 804.

companies could set, at the initiation of their public service, the date at which they would withdraw, abandon or cease their service". In the second *Sunray* case, the court affirmed a Commission refusal to limit the term of a producer's certificate, relying on the earlier opinion.

In *Huber*, the Third Circuit upheld Commission certification of an independent producer engaged in a jurisdictional sale on the date of the *Phillips* decision,[1] notwithstanding the producer's attempt to stop its sale rather than continue under Commission regulation, as specifically permitted by a clause in its contract. Answering the argument that refusal to allow it to exercise its contract right to stop selling was violative of the Fifth Amendment, the court said that the company had given service upon which the public had relied for years and was entitled to continue to rely unless abandonment was approved by the Commission (236 F. 2d 558). In the *Bel Oil*, *Mississippi*, and *Cities Service* cases, the Fifth and Tenth Circuits upheld Commission regulation of increases in rates which producers sought to put into effect, under escalation provisions of previously-filed contracts, without becoming subject to the provisions of Section 4 for suspension, hearing, and refund.

Petitioner's reliance on the philosophy of *Mobile* to support his claim that the contract controlled the term of his obligation to supply gas is answered here, as it was in *Atlantic Refining* v. *Public Service Commission of New York*, 360 U.S. 378, 392:—by granting an unlimited certificate the Commission does not fix the term or overturn the term fixed by the contract between the parties; rather, it authorizes the sale for an un-

[1] *Phillips Petroleum Corp.* v. *Wisconsin*, 347 U.S. 672.

limited term so that the consuming public may be protected, leaving open the question of whether the service may be abandoned (on the date fixed for the end of the contract) for determination under Section 7 (b) of the Act (pertaining to abandonment) upon the facts which are relevant at that time.

2. Petitioner also contends that, in any event, the Commission had here limited the term of the certificate because of the provision that it should "be effective only so long as applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission" (R. 76), and that petitioner had terminated the certificate by stopping service for "several days" when its contract expired (Pet. 15). This argument, too, is without merit. Petitioner rightly concedes (Pet. 15) that he could not terminate his obligation to serve by *unlawfully* stopping deliveries; and his contention that he *lawfully* stopped delivery depends on the argument that his obligation to serve was limited to the term of his contract—a proposition which, as shown above, is wholly incorrect.

Moreover, the court below, assuming that a limited term certificate might have been issued under Section 7 (c) and (e) of the Act, found "nothing to show any intent of the Petitioner to apply for a limited or conditional certificate, nor * * * anything to indicate that the Commission intended to limit its certificate" (Pet. App. 9a). In this conclusion the court was fully warranted by the complete absence of any finding by the Commission, in issuing the certificate, that the public convenience and necessity "required" (Section 7 (e)) or "permitted" (Section 7 (b)) abandonment of the

authorized service at any time, as well as by the absence of any reference in the Commission's order to the contract or its term (R. 61-77).

By the same token, no hearing was required. The certificate was clear upon its face, and required no elucidation by evidence; petitioner does not claim that a mistake was made or present any other reason why a hearing should have been held. There was no real dispute on any matter of fact, but only as to the applicable legal principles.

3. Petitioner accepted the original certificate "authorizing the sale by applicant of natural gas in interstate commerce for resale, *together with the operation of any facilities, subject to the jurisdiction of the Commission, used for the sale* * * *" (emphasis added).[5] Although he does not include it among his questions presented urged as reasons for granting the writ (Pet. 2-3), he contends that the Section 7 (b) prohibition of abandonment without Commission approval does not apply because his sale, made by delivery "to Buyer at the separators which are located adjacent to the respective wellheads" (R. 52), is not made by means of facilities subject to the jurisdiction of the Commission. This, he argues, is because such facilities are exempted by Section 1 (b) of the Act as "production" (Pet. 16-17).

The contention that a producer's sale at or near the well-head is made by means of jurisdictionally exempt "production" facilities has been consistently rejected

[5] He did not object to the certification of the operation of jurisdictional facilities or apply for rehearing (cf., *Continental Oil Co.* v. *FPC*, No. 203, this Term, where the applicant, which also had asked for a declaratory disclaimer of jurisdiction, contested the Commission's certification of facilities).

by the Commission where delivery has been made at a point comparable to that alleged here. Hence, the Commission and the court below were justified in treating this allegation as likewise legally insufficient and not requiring a hearing." The court properly cited its decision rendered the same day in *Continental Oil Co.* v. *F.P.C.*, 266 F. 2d 208 (pending on petition for certiorari, No. 203, this Term), as controlling on this issue. See the Brief for the Federal Power Commission in Opposition, No. 203, this Term.

Petitioner impliedly admits that the Fifth Circuit's *Continental* decision is opposed to his contention on "jurisdictional" facilities, but he claims an intra-circuit conflict with *Deep South Oil Co.* v. *F.P.C.*, 247 F. 2d 882 (C.A.5), certiorari denied, 355 U.S. 930 (see Pet. 18). This assertion is based on the statement in the *Deep South* opinion[7] that the "exemption of production and gathering merely means that the physical activities, facilities and properties used by petitioner in the production and gathering of natural gas are not within the commission's power of regulation" (247 F. 2d at p. 889). The court below denied any conflict

[6] See *F.C.C.* v. *WJR, The Goodwill Station*, 337 U.S. 265; *Sun Oil Co.* v. *F.P.C.*, 256 F. 2d 233, 240-241 (C.A. 5), certiorari denied, 358 U.S. 872.

[7] In *Deep South*, the court had under review the issuance of a certificate (like the one originally issued to petitioner) covering a producer's sale and operation of "any" jurisdictional facilities for the sale. The court held that it did not have to decide whether the producer could discontinue the sale without Commission permission. Section 7 (b) requires Commission permission to abandon jurisdictional facilities "or any service rendered by means of such facilities," and the court's decision therefore meant that it was not deciding whether there were any facilities for making the *Deep South* sale which were subject to Commission jurisdiction.

(Pet. App. 11a), and this is clearly so under the actual basis of its decision in *Continental, i.e.*, that the facilities which contain the gas at the point of delivery at the upper aperture of the upper valve in the well-head "Christmas tree" were facilities for sale, and that "production, as the term is used in this statute, was complete at or before the passage of the gas through the upper aperture of the upper valve" (266 F. 2d at 212). Here, the gas is delivered after it has passed from the well, and not only through the "Christmas tree", but also through connecting pipes and the nearby separator.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
Attorney.

WILLARD W. GATCHELL,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

C. LOUIS KNIGHT,
Attorney,
Federal Power Commission.

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[8] In any event, an intra-circuit conflict is not ground for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901.

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